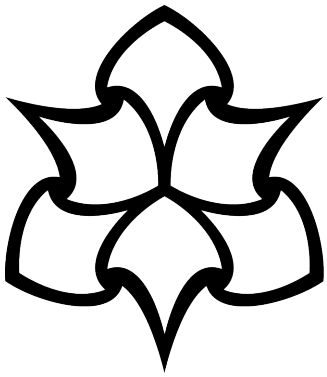

Acquiring Property Rights *ex turpi causa*

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The Court of Appeal decision in *Stoffel & Co v Grondona*[1] highlights the continuing uncertainty surrounding the effect of illegality on enforcement of otherwise available rights. The appellant law firm, having negligently failed to register a Land Registry transfer, sought unsuccessfully to defend the resulting claim arguing that the transfer had, without their knowledge, been made to facilitate a mortgage fraud. The Court of Appeal dismissed the appeal, finding that the respondent's illegal conduct was 'not central, or indeed relevant to the otherwise proper…retainer [but]…simply part of the background story' [2]. The appellant had evidently felt that appealing a straightforward professional negligence finding by reference to the claimant's dishonest, but unconnected, conduct had a realistic chance of success. That the court so clearly disagreed perhaps indicates that the operation of illegality is readily misinterpreted.

The notion that courts will deny wrongdoers a benefit from their wrongful conduct, by preventing them enforcing normal private law rights, is prominent and conceptually attractive: Courts have prevented a highwayman from recovering their criminal

[1] *Stoffel & Co v Grondona* [2018] EWCA Civ 2031
[2] *Stoffel & Co,* n1, at [39]

proceeds,[3] a convicted murderer from claiming under her victim's life insurance,[4] and a motorcycle passenger who encouraged the inebriated rider to drive recklessly from recovering for resulting injuries.[5] The denial of claims arising from the claimant's wrongful action ('*ex turpi causa*') has particular significance where the benefit claimed is valuable, unique or irreplaceable, for example a proprietary right.

Focussing on property disputes presents difficulties. Courts decide such disputes using broad principles where the feature shared by the dispute and the authorities referred to is not that the right claimed is proprietary, but that the claimant's behaviour attracts the court's disapproval. This makes the body of case law unwieldy. The Law Commission described it as 'an intricate web of tangled rules that are difficult to ascertain and distinguish',[6] and as '[lacking] transparency'.[7] Judicial reasoning in this area frequently lacks 'any discussion … of what considerations the court has taken into account in deciding whether the illegality defence applies'[8]. The Law Commission admitted candidly that 'in some areas the uncertainty and complexity is such that we have found it very time consuming and difficult to ascertain…what the present law is'.[9]

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[3] *Everett v Williams* (1725) reported at (1893) 9 LQR 197

[4] *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147

[5] *Pitts v Hunt* [1991] 1 QB 24

[6] Law Commission, *The Illegality Defence* (Law Com No 320, 2010) para 3.5

[7] Law Commission, n6, para 1.5

[8] Law Commission, n6, para 3.5

[9] Law Commission, *Illegal Transactions: the effect of Illegality on Contracts and Trusts* (Law Commission Consultation Paper No 154, 1999) paras 1.12-1.13

Uncertainty of Definition

No single definition of the 'content' of the principle exists. The broad notion that courts will not assist in matters 'tainted by illegality'[10] (itself an attractive but ambiguous phrase) is sometimes described as 'the illegality defence' or simply 'illegality'[11]. The principle is often expressed as '*ex turpi causa non oritur actio'* ('from a base cause, no action will arise').

The difficulties in defining the content of the principle arise in part from uncertainty as to the type of conduct to which it applies. The Law Commission's three possibilities were that it applied only to breaches of the criminal law, that it extended to civil breaches, and that it included 'immoral behaviour'[12]. It concluded, understandably, that deciding which was correct was 'difficult'[13]. The uncertainty surrounding whether the principle applies equally to illegal and immoral conduct has particular relevance to property transactions. Property transfers which facilitate fraud or deprive creditors are likely to be illegal, and in the view of many, immoral. But timely transfers to facilitate Tax planning are normally legal and is likely to be met with differing views as to their morality.

The difficulty of defining the 'content' of the principle is compounded by uncertainty as to its 'status'. It is described variously as a 'doctrine',[14] a 'maxim',[15] a 'rule of

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[10] *Patel v Mirza* [2016] UKSC 42 at [9]

[11] Law Commission, n4 and n7

[12] Law Commission, *The Illegality Defence in Tort*, (Law Com Consultation Paper No 160, 2001) para 1.12

[13] Law Commission, n12, para 1.13

[14] Law Commission, n12, para 5.22

[15] J Mance, '*Ex Turpi Causa* – When Latin Avoids Liability' 18 Edinburgh L.Rev.175 (2014), 175

public policy',[16] an 'instrument of public policy',[17] a 'brocard',[18] ('An elementary principle or maxim',[19]) and, as seen above, a 'defence'. Its nature and function in the context of judicial decision making are unclear. This article uses the term 'principle', although even this term may impart an undeserved impression of substance and clarity.

The principle is evidently longstanding. In *Patel v Mirza*,[20] the claimant sought the return of money transferred to facilitate the unlawful use of insider information. By a majority, the Supreme Court upheld the claim. Opening his judgment, Lord Toulson cited Lord Mansfield's statement in *Holman v Johnson* that "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act".[21]

These prominent dicta, suggesting clear and undisputed principle, reveal an immediate ambiguity; Does the court's refusal to act apply where the claimant's conduct is both immoral *and* illegal, or can it apply (as a disjunctive interpretation of 'or' suggests) where the conduct is one but not both?

Developing his reasoning, Lord Toulson quoted Lord Mansfield more fully, to the effect that:

> If…the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted … not for the sake of the defendant, but because they will not …aid …such a plaintiff. So if …the defendant was to bring his action against the plaintiff, the

[16] J Mance, n15, 175

[17] *Bakewell Management Limited v Brandwood* [2004] UKHL 14 at [60]

[18] J Mance, n15, 176

[19] W Little and others, *The Shorter Oxford English Dictionary vol 1,* (3rd edn, Clarendon Press 1969) 224

[20] *Patel*, n10

[21] *Holman v Johnson* (1775) 1 Cowp 341, 343

> latter would then have the advantage of it; for where both are equally at fault, *potior est conditio defendentis*.[22]

This provides little clarity. Without explanation, Lord Mansfield apparently treated 'ex turpi causa' and 'the transgression of a positive law' as synonymous. 'turpis' literally means 'ugly, foul, [or] unsightly'.[23] Its transferred meanings of 'morally disgraceful, shameful [or] base',[24] have no immediate connection with 'positive law'.

Immediately before the above dicta, Lord Mansfield stated:

> The objection, that a contract is immoral or illegal as between the plaintiff and the defendant, sounds…very ill in the mouth of the defendant. It is not for his sake, however, that the objection is … allowed; but is founded on general principles of policy, which the defendant has the advantage of, contrary to real justice, as between [the parties], by accident...[25]

Here, he distinguishes immoral and illegal contracts more explicitly, but omits reference to non-contractual conduct. In explaining the 'general principles of policy' he identified only one principle, which he set out as '*ex dolo malo non oritur actio*', and which, translated, formed the opening statement of Lord Toulson's judgement in *Patel*. '*ex dolo malo*' translates as 'from fraud',[26] which is more specific than '*ex turpi causa*' ('from a base cause'). Perhaps most surprising is the admission that application of *ex turpi causa,* being accidental rather than designed is, or at least can be, 'contrary to real justice'.

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[22] *Patel*, n10, para [1]

[23] D P Simpson, *Cassell's Latin-English English-Latin Dictionary* (5th edn, Cassell 1987) 619

[24] Simpson, n23, 619

[25] *Holman*, n21, 343

[26] Simpson, n23, 201

These observations are not merely exercises in legalistic or linguistic pedantry. A disconcerting 'looseness' in articulating the principle obscures its nature and effect. Were Lord Mansfield's pronouncements merely of historical interest, this might be less problematic, but as Lord Goff noted, the principle in *Holman*, misleadingly described as 'basic',[27] and 'clear and well recognised'[28] has been applied 'again and again, for over 200 years'.[29] As Balcombe LJ noted in *Pitts v. Hunt*, 'the ritual incantation of the maxim' is 'more likely to confuse than illuminate'.[30]

Such incantation negates appropriate consideration of historical context. The court in *Patel* remarked that the doctrine in *Holman* was 'formulated in a society that was vastly different from that which exists today…[and] which was much less regulated'.[31] The relevance to contemporary property disputes of a judicial pronouncement made two centuries ago and more cautiously than is sometimes acknowledged can reasonably be questioned.

Investigating the principle's Roman Law origins adds little clarity. Describing the related principle that 'where both parties are equally at fault, the defendant's position is stronger', Grodecki identifies 'uncertainty as to the principles which … guide the courts'.[32] Early Roman Law contracts remained binding even if their purpose was 'illegal or immoral'.[33] An exception developed for arrangements which courts would

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[27] *Tinsley v Milligan* [1994] 1 AC 340, 354 per Goff LJ

[28] *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724, 728 per Lindley LJ

[29] *Tinsley*, n27, 355

[30] *Pitts v Hunt* [1991] 1 QB 24, 49

[31] *Patel*, n10, para [52], Lord Toulson quoting from *Nelson v Nelson* (1995) 184 CLR 538, 609

[32] J K Grodecki, 'In pari delicto potior est conditio defendentis', 71 LQR (1955) 254

[33] Grodecki, n32, 254

not enforce because of 'turpitudo' by one or both contracting parties. In defining 'turpitudo', Grodecki supports what he calls a 'narrow' interpretation, applicable only to conduct which was 'immoral, and not merely illegal',[34] i.e. both immoral and illegal, thereby implying that conduct could be illegal without being immoral, but not seemingly the other way round.

A conclusion that *ex turpi causa* comprises 'an unhappy mix of rigid rules and value judgements' [35] is reinforced by a tendency to treat it and *in pari delicto* as two aspects of a broader 'illegality' principle[36] .This disregards their literal meanings and inherent differences. *in pari delicto* envisages two opposing parties, who are equally at fault. *ex turpi causa* does not. A dispute might involve both principles, but many property disputes involve either multiple parties whose levels of fault differ or a single party who is at fault.

Uncertainty of Application

If the apparent simplicity and practical appeal of *ex turpi causa* conceals longstanding uncertainty as to its nature and function, applying it has, unsurprisingly, created 'unpredictable and haphazard consequences'.[37] The Law Commssion found that courts frequently cited Lord Mansfield's comments in *Holman*, but left

[34] Grodecki, n32, 255

[35] Mance, n15, 176

[36] For example, L Caylor and M Kenney, '*In Pari Delicto* and *Ex Turpi Causa*: The Defence of Illegality-Approaches Taken in England and Wales, Canada and the US', Business Law International Vol 18, No 3, September 2017, 259

[37] Mance, n15, 176

unaddressed the rationale for applying them, the reasoning varying 'even between members of the same court'.[38]

Caselaw reveals an uncomfortable mix of approaches to applying the principle. One approach considers whether granting relief would offend 'the public conscience.'[39] In *Euro-Diam Ltd v Bathurst*, Kerr LJ stated:

> The ex turpi causa defence … rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff … relief'.[40]

Significant here is the reference to 'all the circumstances' (which Lindley LJ confirmed in *Scott v Brown, Doering, McNab & Co* [41] exceed those pleaded), and the breadth and possible subjectivity of 'an affront to the public conscience' . Requiring courts to identify 'all the circumstances' and to decide whether affording relief would offend 'the public conscience' appears overwhelming, but the resemblance of 'an affront to the public conscience' to the literal meaning of 'turpis' cannot be overlooked. Nor, it is suggested, does or should deciding what offends the public conscience necessarily imply excessive discretion or subjectivity. An analogy may be drawn with 'unconscionability', which initially appears disconcertingly broad and subjective, but which is 'vital' to deciding proprietory estoppel disputes,[42] establishing constructive trusts and the equitable perfection of imperfect gifts. Lord Walker's

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[38] Law Commission, n12, para 5.22

[39] *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, 35

[40] *Euro-Diam Ltd,* n39, 35

[41] *Scott*, n28, 728

[42] M Pawlowski and J Brown, 'Proprietary Estoppel and Competing Equities' (2018) 82 Conv. Issue 2 145, 155

definition of unconscionability as 'an *objective* [emphasis added] value judgment on behaviour',[43] provides reassurance that individual notions of what is unconscionable, or what, in the context of *ex turpi causa*, offends the public conscience, can effectively be displaced.

Nevertheless the 'public conscience' test has been displaced by the 'reliance' test. In *Tinsley*,[44] a couple put their property in the sole name of one of them, on the understanding that they were joint equitable owners, thereby enabling the other to make fraudulent benefit claims. The legal owner subsequently claimed sole beneficial ownership. By a majority the House of Lords upheld the trust, finding that reliance by the defendant on her illegal conduct was unnecessary to her claim, which rested upon common intention and contribution to the purchase price.

The decision to abandon the 'public conscience' test appears to have been unanimous. Lord Goff, giving the leading dissenting judgment stated that:

> the adoption of a public conscience test…would constitute a revolution in this branch of the law, under which … a discretion would become vested in the court to deal with the matter by…a balancing operation, in place of a system of rules, ultimately derived from the principle of public policy enunciated by Lord Mansfield C.J. in Holman v. Johnson which lies at the root of the law relating to claims which are … tainted by illegality.[45]

Two points may be made. Firstly, can 'an unhappy mix of rigid rules and value judgments'[46] really constitute 'a system', with its associated ideas of order and transparency? Secondly, as Mance suggests, the retention of a public conscience

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[43] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55 at [28]

[44] *Tinsley,* n27

[45] *Tinsley*, n27, 363

[46] Mance, n15, 176

test would 'not perhaps have [been] so outlandish'.[47] As will be seen, judicial and statutory authority (notably in New Zealand) for a 'balancing operation', of the type of which Lord Goff disapproved, is already evident.

Lord Browne-Wilkinson similarly held that 'the consequences of being a party to an illegal transaction cannot depend… on such an imponderable factor as the extent to which the public conscience would be affronted …'[48] This emphasis on the 'consequences' of a finding of illegality, which can be arbitrary and 'blunt', is significant. The problem is perhaps less the imponderable nature of an 'affront to the public conscience' in itself, but more the 'binary' nature of the result which a finding of such an affront has.

A comparison of *Tinsley* with *Collier v Collier* [49] reveals the 'random application' of the principle.[50] Mr Collier had transferred premises to his daughter, intending to defraud creditors and the Inland Revenue. She sought to terminate the licence under which he continued to occupy them. The Court of Appeal accepted that Mr Collier and his daughter had agreed that she would hold the premises on trust for him. Nevertheless, it held he could only establish the trust by reference to its illegal terms. His claim for return of the premises failed and his daughter 'gained a million-pound windfall'.[51]

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[47] Mance, n15,179

[48] *Tinsley*, n27, 369

[49] *Collier v Collier* [2003] 1 P & C R DG3

[50] Mance, n15, 182

[51] Mance, n15, 182

In both *Tinsley* and *Collier* the parties knowlingly transfered land for a fraudulent purpose. Mance identifies '[no] real difference in opprobrium…between…Miss Milligan and [Mr Collier]'.[52] Yet she succeeded and he failed. By happy accident and selective reference to the facts, she could, unlike Mr Collier, argue the existence of a beneficial interest without referring to her fraudulent behaviour. Investigation into her broader conduct exposed her dishonesty. But this distinction seems contrived and requires division of a party's conduct into those parts which are illegal and those which are not, thereby disregarding the 'pattern' of dishonesty evident in both cases. Lord Mansfield in *Holman* appears to have envisaged that the overriding consideration was the *existence* of illegality in an overarching sense (and however that is framed, both Miss Milligan's and Mr Collier's conduct fell within it), not the narrower technical point of whether that illegality needed to be pleaded.

Nor, it is suggested, does 'reliance' accurately reflect the role which illegality played in the parties' arguments. Almost certainly, they would have preferred to conceal their dishonesty; Miss Milligan repaid the benefits in full, and Mr Collier argued that his fraudulent intention was never fulfilled. To that extent the dishonesty simply 'emerged', rather than being 'relied upon' in the sense of being brought with confidence and assurance to the forefront of an argument.

Patel v Mirza represents another approach as to how *ex turpi causa* should be applied, emphasizing the importance of principle and proportionality. Lord Toulson described its rationale as:

[52] Mance, n15, 182

> it would be contrary to the public interest to enforce a claim if to do so would [harm]…the integrity of the legal system (or possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear).[53]

He stated that identifying possible harm to the public interest required consideration of, firstly, 'the underlying purpose of the prohibition which has been transgressed', secondly, 'any other relevant public policy on which denial of the claim may have an impact' and thirdly, whether 'denial of the claim would be a proportionate response to the illegality'.[54] Lim calls maintaining the integrity of the legal system and the subsequent considerations, 'propositions 1, 2a, 2b and 2c'.[55] Lord Toulson concluded by stating that 'the public interest is best served by a principled and transparent assessment of the considerations identified',[56] rather than by a formal approach resulting in 'arbitrary, unjust, or disproportionate' results.[57]

A desire that judicial decision making be 'principled' assumes that clear principles exist. In this context, it is contended that they do not. Furthermore, Lord Toulson's proposal appears to be a 'balancing operation' in relation to competing public policy considerations of the type to which Lord Goff in *Tinsley* objected, but leaves unaddressed the priority or relative weights of propositions 1, 2a, 2b and 2c. Lim's view that Lord Toulson's approach 'has merely replaced the existing uncertainties with another or different level of uncertainty' would appear the most likely outcome.[58]

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[53] *Patel*, n10, at [120]

[54] *Patel*, n10, at [120]

[55] E Lim, '*Ex Turpi Causa:* Reformation not Revolution', (2017) 80(5) MLR 927, 930

[56] *Patel*, n10, at [120]

[57] *Patel*, n10, at [120]

[58] Lim, n55, 936

There is also an inherent difficulty in defining 'proportionality'. Lord Mansfield did not refer to it in *Holman*. His acknowledgment that the principle operates 'contrary to real justice' indicates that any suggestion that the principle should provide a proportionate response either to the harm suffered, or to the claimant's fault is misplaced. The factors identified by Lord Toulson to determine the proportionality of refusing relief, including 'the seriousness of the conduct, its centrality to the contract… and whether there was a marked disparity in the parties' respective culpability'[59] are merely illustrative and infinitely variable.

Inflexibility of Outcome

The effect of imperfect definition and inconsistent application of *ex turpi causa* is heightened by the starkness of the relief available. Where it applies, the effect is not judicial disapproval (although elements of this were evident in the rejected 'public conscience' test), but 'judicial abstention'.[60] In property disputes, the property 'lie[s] where it falls'[61], demonstrating a curious judicial indifference towards undeserved gain. This 'bluntness' sits uneasily with the allocation of proprietory interests elsewhere. Proprietory estoppel allows varied remedies including the grant of a life interest or the transfer of a legal or equitable interest. The Trusts of Land and Appointment of Trustees Act 1996 allows courts hearing disputes on the nature and

[59] *Patel*, n10 at [107]

[60] *Les Laboratoires Servier v Apotex* [2014] 3 WLR 1257 at [23]

[61] *Singh v Ali* [1960] AC 167 at 176-177

extent of a proprietory interest to make such orders as they 'think fit',[62] having regard to the circumstances of the trust.[63]

Conflict of *ex turpi causa* with prescription and adverse possession

Equally problematic is the uncertain application of *ex turpi causa* to prescription and adverse possession. Prescriptive claims rest on a 'tortious invasion of the servient owner's land',[64] which is 'cured by the effluxion of the prescriptive period'.[65] This uncertain application becomes particularly noticable where the conduct is criminal. In *Bakewell Management Ltd v Brandwood*,[66] Brandwood claimed prescriptive vehicular rights across a common. Bakewell opposed the claim, relying on the prohibition under section 193(4) Law of Property Act 1925 of driving across common land 'without lawful authority'.

The House of Lords held that public policy did not prevent the acquisition of a prescriptive right where lawful authority could have removed the criminality. It held that the finding did not reintroduce the public conscience test rejected in *Tinsley*, but that 'the maxim *ex turpi causa* must be applied as an instrument of public policy, and not in any circumstances where it does not serve any public interest'.[67]

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[62] Trusts of Land and Appointment of Trustees Act 1996 ('TOLATA 1996') s 14(2)(b)

[63] TOLATA 1996 s 15(1)

[64] K Gray and S F Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009), 669

[65] K Gray and S F Gray, n64, 669

[66] *Bakewell,* n17

[67] *Bakewell*, n17 at [60] per Lord Walker

The facts of *Bakewell* render this assertion unsatisfactory. Section 193 evidently serves a public purpose. Sections 193(1) and (4) allow the public 'rights of access for air and exercise' and prohibit camping and lighting fires on common land, the evident intention being to maintain public appeal. If the section serves a public purpose, it is unclear why preventing someone acquiring a valuable proprietory interest from breaching it is not also in the public interest. The reasoning appears to be that the public benefit served by enforcing the statute is not non-existent, but was outweighed by the public benefit served by breach of it, essentially a 'balancing' of competing public priorities. Rather than stating this, the court envisaged a scenario in which the servient owner could have granted permission. Where the absence of lawful authority is not in doubt, it is not immediately obvious why the court should be concerned with a hypothetical outcome had something, which was evidently not the case, been the case.

It is suggested that the decision was in large part driven by a concern for proportionality, as envisaged later by Lord Toulson in *Patel*. Vehicles had used one track across a large common for decades, apparently harmlessly. Consequently it was disproportionate then to prohibit that conduct in order to preserve a minimal public benefit. The broader conclusion appears to be, however, that deciding the proper meaning and effect of the illegality was avoided rather than addressed.

Equally problematic is the proper application of *ex turpi causa* to adverse possession cases where the squatter's conduct is criminal. In *R (on the application of Best) v The Chief Land Registrar*,[68] the Land Registrar rejected Mr Best's application, as his conduct breached section 144 Legal Aid, Sentencing and Punishment of Offenders

[68] *R (on the application of Best) v The Chief Land Registrar* [2015] EWCA Civ 17

Act 2012. Finding otherwise, Sales, McCombe and Arden LLJ addressed the significance of his criminal conduct very differently.

McCombe LJ held that the decision was 'powerfully supported' by the House of Lords decision in *Bakewell*,[69] and appeared firmly to support the means by which illegality of the conduct in *Bakewell* was neatly, if not altogether convincingly, addressed.

Arden LJ on the other hand reached her conclusion 'purely through conventional statutory interpretation'.[70] She expressly stated that she did *not* rely on *Bakewell*,[71] and concluded that Parliament's intention was that adverse possession should not be barred by acts which contravened section 144.[72] In her view, the facts and proper statutory construction were 'sufficient to exclude *ex turpi causa* in this instance'.[73]

The apparent ease with which both judges concluded that *ex turpi causa* did not apply contrast with the efforts which Sales LJ made to explain how it *did* apply, but could be adapted. He appeared to treat it as merely one of several competing considerations, and to impart it with a significant capacity for modification. He stated that 'the public interest in having land put to good use and in having clear rules to govern acquisition of title to [abandoned] land … override[s] the general concern that a person should not benefit from their own unlawful actions'.[74]

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[69] *Best*, n68, at [99]–[100]

[70] *Best*, n68, at [101]

[71] *Best*, n68, at [109]

[72] *Best*, n68, at [133]

[73] *Best*, n68, at [133]

[74] *Best*, n68, at [44]

Quoting directly from Lord Wilson's judgment in *Hounga v. Allen*,[75] (which permitted an employee illegally in the UK to claim unlawful race discrimination), Sales LJ identified the inherent flexibility of rules based on public policy. He quoted from Bowen LJ in *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt*,[76] that such rules 'not being rules which [are] fixed or customary law, are capable, on proper occasion, of expansion or modification'.[77]

He then undertook 'a balancing of public policy factors',[78] asking firstly 'What … aspect of public policy… founds the defence', and secondly 'is there another aspect of public policy to which application of the defence would run counter?'.[79] He appeared (adopting the *Bakewell* reasoning) to conclude from the fact that because a houseowner can, by consent, remove the criminality of the squatter's conduct, there was no 'overriding public policy concern associated with s.144 …to affect the usual balance of interests…established by … adverse possession'.[80]

What emerges is considerable doubt surrounding the role, if any, which *ex turpi causa* plays, whether it can be displaced entirely by statutory interpretation, and whether it is capable of expansion and modification. For judicial consensus on the outcome for the claimant to co-exist with such profound disagreement as to how that consensus is reached is neither conceptually nor practically satisfactory.

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[75] *Hounga v. Allen* [2014] UKSC 47

[76] *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch 630, 661

[77] *Best*, n68, at [53]

[78] *Best*, n68, at [86]

[79] *Best*, n68, at [53]

[80] *Best*, n68, at [88]

Clarification

A step towards clarity might be formally to determine the applicability of the principle to immoral conduct. Responding to a Law Commission draft Bill, confined to trusts made to conceal criminal activity, Davies argues that extension to immoral conduct would create 'unnecessary uncertainty'.[81] Significant here is the distinction between 'uncertainty' and 'unnecessary uncertainty': It might be argued that some uncertainty is a necessary feature of a principle which attempts to address a complex range of facts and behaviours.

Defining immoral conduct presents considerable difficulties: HM Revenue and Customs describe lawful tax avoidance as 'bending the rules of the tax system to gain a tax advantage'.[82] Describing the same behaviour, the Adam Smith Institute states simply 'There's only obeying the law and not obeying it'.[83] Nevertheless it is suggested that to exclude from application of the principle conduct which is merely immoral may be too restrictive. Statutory provisions elsewhere openly prohibit immoral conduct, at least in a contractual context: In Israel, section 30 Contracts (General Part) Law 5733-1973 states unambiguously that, 'A contract, the conclusion, contents or object of which are illegal, immoral or contrary to public policy is void'. In England and Wales, judicial indications that the principle does, or at least can, extend to immoral conduct are prominent[84]

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[81] P Davies, 'Turning the Clock Back' [2010] 74 Conv, Issue 4 282**,** 283

[82] https://www.gov.uk/guidance/tax-avoidance-an-introduction (last accessed 14 September 2018)

[83] https://www.adamsmith.org/blog/tax-spending/there-is-no-such-thing-as-tax-avoidance (last accessed 14 September 2018)

[84] *Patel,* n10 per Lord Toulson, *Euro-Diam,* n39 per Kerr LJ, *Holman,* n25 per Mansfield LJ

To dismiss the applicability of the principle to immoral conduct also disregards the realities of statutory and judicial law making. Morality, and legislative and judicial responses to it, are fluid: Efforts to curtail tax avoidance attempt to convert immoral conduct to unlawful conduct. Newly devised tax avoidance schemes lie between possible immorality and illegality until tested. Refusal to apply the principle to immoral conduct also disregards anomalies in the current law, for example the limitation of the criminal offence of squatting to residential property; morally, the distinction between occupying derelict houses and occupying derelict factories might be questionable, but legally the distinction is vital.

A more pressing requirement is perhaps clarifying operation of the principle more broadly. Possible reforms to its substance and application depend on reformers' appetite for contention. Lim suggests amending Lord Toulson's articulation in *Patel*, subordinating the 'proportionality' consideration (proposition 2c) to those which precede it.[85] Cases capable of resolution using propositions 1, 2a and 2b would not require consideration of proposition 2c. Subordinating proportionality would, Lim argues, address the vulnerability of that consideration to the criticism that Lord Goff made in *Tinsley* of the reliance test, that it would require the court to undertake a balancing exercise on a case by case basis.[86]

Such clarification of existing judicial dicta is attractive, but leaves unaddressed how propositions 1, 2a and 2b would relate to each other. Moreover, Lord Toulson's dicta, being both illustrative and deliberately broad might not support so subtle a clarification. To subordinate proportionality in this way also appears to conflict with its

[85] Lim, n55 , 937-938

[86] Lim, n55 , 935

prominence in *Stoffel*, where the argument that it would be 'entirely disproportionate'[87] to deny the claimant's claim appears to have prevailed.

The principle's intimidating breadth might be addressed by allowing it to develop separate lines of authority, so that illegality in the acquisition of property rights differs from illegality in property law more broadly and from illegality in contract, tort or employment law. This 'splitting' the principle would reduce the range of factually dissimilar authorities with which practitioners and courts must currently engage.

There is evidence that such a distinction already exists. Paraphrasing Lord Hoffman in *Gray v. Thames Trains Ltd*,[88] Lord Toulson in *Patel* observed that:

> *ex turpi causa* expresses not so much a principle, but a policy based on a group of reasons, which vary in different situations. The courts…therefore evolved varying rules to deal with different situations. Because questions of fairness and policy were different in different cases and led to different rules, one could not simply extrapolate rules applicable to one situation and apply them to another.[89]

This warning against treating cases as transposable authorities calls into question the tendency of courts to draw upon factually diverse cases. Division of the principle into discrete areas might be effected by statutory provision that in disputes involving, for example, real property, contract or tort, courts should only consider decisions concerning illegality in areas outside those as they think is justified on the facts.

Attempts at reform in England and Wales favour an incremental approach. The Law Commission's 2010 draft Bill'[90] concerns only the use of trusts to conceal criminal

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[87] *Stoffel & Co,* n1 at [39]

[88] *Gray v Thames Trains Ltd* [2009] AC 1339, [32]-[34]

[89] *Patel*, n10, at [29]

[90] The Law Commission, n6, Appendix A, 57

activity, leaving *ex turpi causa* to develop differently elsewhere. It applies to trust disputes concerning 'any property',[91] where a party claiming an equitable interest would succeed if reliance on an unlawful act were permitted,[92] and where 'concealment conditions' are met.[93] These relate to concealing equitable interests 'in connection with the commission of an offence'.[94] The 'starting point' under the draft Bill is that courts should disregard such illegality, thereby entitling the claimant to the relevant equitable interest.

Only in 'exceptional' (which is undefined) circumstances can courts deny claimants the equitable interest, which must then pass to the trustee, the settlor or another beneficiary (but not more than one of these)[95]. In identifying exceptional circumstances, the court may consider 'anything which it thinks relevant' including 'the conduct of all relevant persons',[96] 'the value of the relevant equitable interest',[97] and 'any deterrent effect on others'.[98]

The presumption that a wrongdoing party *will* be able to enforce rights differs from the New Zealand and Israel presumption that a wrongdoing party will be denied

[91] Draft Trusts (Concealment of Interests) Bill, s 1(1)(a)

[92] Draft Trusts Bill, n91, s 1(1)(b)

[93] Draft Trusts Bill, n91, s 1(1)(c)

[94] Draft Trusts Bill, n91, s 2(2)

[95] Draft Trusts Bill, n91, s 4(3)(a)

[96] Draft Trusts Bill, n91, s 5(1)(a)

[97] Draft Trusts Bill, n91, s 5(1)(c)

[98] Draft Trusts Bill, n91, s 5(1)(e)

normal remedies.[99] The draft Bill only covers trust arrangements connected with criminality. It leaves 'exceptional circumstances' undefined for the purposes of rebutting the presumption, believing that definition could 'safely be left to the courts'.[100] This creates 'an obscure burden of uncertain height',[101] above which the court's wide discretion should apply, and an unexplained imbalance between the breadth of the factors which the court may consider, and the narrowness of the options available to it following that consideration.

The draft Bill is intended, within its narrow scope, to 'abolish' the reliance principle,[102] but appears to avoid suggesting reinstating the public conscience test. The distinction between the discretion afforded by the draft Bill, and the public conscience test appears 'very fine',[103] or, it is argued, imperceptible, but whether this is deliberate is unclear.

Nevertheless, the draft Bill's brevity and order contrast favourably with current complexity and ambiguity. Its narrow application also supports the suggestion that illegality can operate differently in different areas. Removing one area of law from an unwieldy and unpredictable principle improves upon inaction.

The draft Bill also explicitly allows illegality to be disregarded. Such disregard is implied in *Best*, but express provision is welcome. Finally the discretion afforded on what factors the court might consider (and depending on how 'exceptional' were

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[99] Davies, n85, 287-288

[100] The Law Commission, n6, para 260

[101] Davies, n85, 289

[102] The Law Commission, n6, para B.2, 62

[103] Davies, n85, 289

construed, the circumstances in which that discretion arises) is broad, and evidently deliberately so.

An amended draft Bill might remove the reference to 'exceptional circumstances' to allow courts broad discretion to consider or disregard unlawful conduct. Davies argues that such discretion would be 'vague'.[104] But perhaps this approach differs from that currently applied only in the extent to which judges expressly articulate the role which their own discretion, rather than precedent, plays. An amended draft Bill might also permit the broad discretion available in 'exceptional circumstances' also to govern where the equitable interest should fall. If the inflexibility of the outcome following a finding of *ex turpi causa* might lie behind the inconsistency of courts when applying it, this would best be addressed by removing that inflexibility.

The limited remedies under the draft Bill contrast with those available in New Zealand. The Contract and Commercial Law Act 2017 defines an 'illegal contract' as one which 'is illegal at law or in equity, whether [in] …creation or… performance'.[105] It presumes such contracts are ineffective, but allows courts wide discretion to displace the presumption and to grant such relief as it 'thinks just'[106], including restitution, compensation, variation or total or partial validation of the contract and the vesting or delivery up of all or part of any property.[107]

Conclusion

The intimidating breadth and enduring complexity of *ex turpi causa* present clear practical disincentives to reform. Reformers may justifiably feel that their efforts will

[104] Davies, n85,289
[105] Section 71(1)(a) The Contract and Commercial Law Act 2017
[106] Sections 75 and 76 The Contract and Commercial Law Act 2017
[107] Section 76(4) The Contract and Commercial Law Act 2017

go unrewarded, and that identifying how the principle operates now, leaving aside how that operation might be improved, is in some sense ‘too difficult’. Nevertheless, the inescapable appeal of preventing wrongdoers benefitting from their wrongdoing means courts will continue to be encouraged to withhold remedies in such circumstances. Similarly, defendants will continue to utilise the current complexity by pointing to unlawful aspects of the claimant’s behaviour. Doubt surrounding the principle’s status and function will continue.

If maintaining the integrity of the legal system is, as Lord Toulson in *Patel* stated, the primary pupose of *ex turpi causa*, it is suggested that that maintenance requires renewed enthusiasm for reform, departure from familiar precedents which deny courts clear guidance, a more explicit intention of developing *ex turpi causa* incrementally in different areas, and exclusion from its application of prescription and adverse possession. It is also suggested that the integrity (although almost certainly not, it is conceded, the clarity) of the legal system would not be harmed by applying the principle to immoral conduct. The discretion afforded in New Zealand, perhaps coupled with a formal extension to such conduct, as alluded to in *Holman*, *Euro-Diam* and *Patel,* might be a realistic starting point.